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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. BOBBY JAN PHOMMACHANH, Defendant and Appellant.	C081185 (Super. Ct. Nos. STK-CR-FE-2014-0008189, SF129707A)

Defendant Bobby Jan Phommachanh was convicted of multiple crimes following an incident in which he fired multiple gunshots in a bar thereby injuring two people. On appeal, he contends (1) the trial court erred by instructing the jury with a "kill zone" instruction with respect to charges of attempted murder, (2) he cannot be convicted of multiple counts of shooting at an occupied building, (3) he should have been awarded more presentence custody credit, and (4) we must remand to the trial court to state the statutory authority for a $500 surcharge imposed. The People oppose some of

defendant's contentions, concede others, and request remand to the trial court for clarification of yet another aspect of sentencing. We will modify the judgment to award defendant presentence conduct credit, to vacate certain stayed sentencing enhancements, to correct an unauthorized sentence, and to clarify the statutory basis for a mandatory fee; we order correction of the abstract of judgment to state the statutory basis for the $500 surcharge; we otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of August 30 to 31, 2014, Adriana M. and Eric C. were at a bar celebrating with friends and family. While at the bar, a fight erupted that involved some of the group with whom Adriana M. and Eric C. were celebrating. Eric C. too became involved in the fight, which ended when defendant, who had been in the bar and ran outside during the fight, ran back inside the bar firing a nine-millimeter semiautomatic gun. Defendant aimed the gun in the direction of Eric C., Adriana M., and a couple other members of their group and fired more than one shot. Sometime later, defendant apologized to Eric C. for shooting both him and Adriana M., and told Eric C. he had been trying to shoot only him.

Adriana M. was struck by three bullets. Eric C. was struck once, though he had multiple bullet holes in the shirt he was wearing. Video evidence indicates all the shots were fired in a period of approximately three seconds. Officers recovered seven 9-millimeter shell casings from outside and at the threshold of the bar, and a bullet fragment from inside the bar.

Defendant was charged with the attempted willful, deliberate, and premeditated murders of Adriana M. and Eric C. (counts 1 and 4, respectively; Pen. Code, §§ 187, subd. (a), 664),[1] two counts of shooting at an occupied building (counts 2 and 5; § 246),

[1] Undesignated statutory references are to the Penal Code.

two counts of assault with a semiautomatic firearm (counts 3 and 6; § 245, subd. (b)), and one count of being a felon in possession of a firearm (count 7; § 29800, subd. (a)(1)). It was also alleged as to all counts, that defendant had suffered two prior strike convictions (§§ 667, subd. (d), 1170.12, subd. (b)); as to counts 1 through 6, that defendant had been convicted of two prior serious felonies (§ 667, subd. (a)) and had two prior prison terms (§ 667.5, subd. (b)); as to counts 1, 2, 4, and 5, that defendant discharged a firearm causing great bodily injury (§12022.53, subd. (d)); as to counts 1, 3, 4, and 6, that defendant personally used a firearm in the commission of a felony (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)); and, as to counts 1 and 4, that defendant had personally discharged a firearm (§ 12022.53, subd. (c)) and personally used a firearm (§ 12022.53, subd. (b)).

The jury found defendant guilty of all counts and sustained all the enhancement allegations (other than the previously bifurcated allegations that defendant had prior serious felony and strike convictions and prior prison terms). The trial court sustained the bifurcated allegations of prior serious felony convictions and dismissed the prior prison term allegations. The trial court sentenced defendant to a determinate term of 26 years in state prison (six years for count 7 and four 5-year terms for prior serious felony conviction enhancements on counts 1 and 4), with a consecutive indeterminate term of 100 years to life (comprised of 25-year-to-life sentences each for counts 1 and 4, and 25 years to life for personally and intentionally discharging a firearm and proximately causing great bodily injury in the commission of each of counts 1 and 4). The trial court also imposed sentences but stayed execution of the sentences for counts 2, 3, 5, and 6 pursuant to section 654, as well as for some of the enhancements.[2] Defendant was

[2] As to count 2, the trial court imposed a sentence of five years for shooting at an occupied building, plus an additional 25-year-to-life term for personal and intentional discharge of a firearm proximately causing great bodily injury (§ 12022.53, subd. (d)), and two additional five-year terms for prior serious felonies (§ 667, subd. (a)). (See

awarded 445 days of presentence custody credit for actual time served. Among other fines and fees imposed, the trial court imposed a $500 surcharge on the $5,000 restitution fine imposed pursuant to section 1202.4.

DISCUSSION

Defendant challenges his convictions for the attempted murders of Eric C. and Adriana M. claiming the trial court prejudicially erred by instructing the jury with a "kill zone" instruction not supported by the evidence. We conclude the trial court did not err in providing the instruction. Defendant also challenges one of his convictions for shooting at an occupied building, claiming he cannot receive multiple convictions for this crime because there was a single shooting incident. We conclude the evidence that defendant fired the gun at the occupied building multiple times supports his multiple convictions for shooting at an occupied building in the instant case. Defendant also asserts he is entitled to presentence conduct credit and remand for the trial court to state the statutory basis for the surcharge imposed. The People do not dispute these claims, and we agree modification of the presentence custody credit award is needed; however,

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further discussion of the sentence for count 2 in pt. 5.0 of the Discussion, *post*.) As to counts 3 and 6, the trial court sentenced defendant to 25 years to life for assault with a semiautomatic firearm, plus 10 years for personal use of a firearm (12022.5, subd. (a)), an additional three-year term for personally inflicting great bodily injury (12022.7, subd. (a)), and two additional five-year terms for prior serious felonies (§ 667, subd. (a)). As to count 5, the trial court sentenced defendant to 25 years to life for shooting at an occupied building, plus an additional 25-year-to-life term for personal and intentional discharge of a firearm proximately causing great bodily injury (§ 12022.53, subd. (d)), and two additional five-year terms for prior serious felonies (§ 667, subd. (a)). For counts 1 and 4, the trial court imposed and stayed, purportedly pursuant to section 654, the following sentencing enhancements: 20 years for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)), 10 years for personal use of a firearm (§ 12022.53, subd. (b)), 10 years for personal use of a firearm (§ 12022.5, subd. (a)), and three years for personally inflicting great bodily injury (§ 12022.7, subd. (a)). (For further discussion of these enhancements, see pt. 5.0 of the Discussion, *post*.)

no remand is necessary to state the statutory basis for the surcharge. Finally, though not raised by either party, we will modify the judgment to correct unauthorized sentences imposed by the trial court for counts 2 and 7, and for enhancements erroneously imposed and stayed for counts 1 and 4.

1.0 "Kill Zone" Instruction

Defendant contends the trial court committed reversible error when, over his objection and without supporting evidence, it instructed the jury with a "kill zone" instruction for the attempted murder counts.[3] Defendant argues the only evidence was that defendant was trying to shoot Eric C., and indeed that is what the prosecutor argued to the jury; thus, there was no basis for an instruction on the kill zone theory of attempted murder as to victim Adriana M. in count 1. We disagree.

The trial court has a " 'duty to see to it that the [jurors] are "adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 70.) Thus, " '[t]he trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." [Citation.] "It is an

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[3] The challenged jury instruction given by the court, in conformity with CALCRIM No. 600, was: "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Adriana [M.], the People must prove that the defendant not only intended to kill Eric [C.] but also either intended to kill Adriana [M.] or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Adriana [M.] or intended to kill Eric [C.] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Adriana [M.]."

elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference." ' " (*People v. Alexander* (2010) 49 Cal.4th 846, 920-921.)

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) The crime of murder does not require an intent to kill; rather, "[i]mplied malice—a conscious disregard for life—suffices." (*People v. Bland* (2002) 28 Cal.4th 313, 327 (*Bland*).) That is not true, however, for the inchoate crime of attempted murder, which " 'requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' " (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) And, the wrongdoer "must intend to kill the alleged victim, not someone else." (*Bland*, at p. 328.) However, "a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Id.* at p. 331, fn. 6.)

The concurrent intent theory is sometimes referred to as a "kill zone" theory. (*Smith*, *supra*, 37 Cal.4th at pp. 745-746.) That theory provides that "where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim," the jury can reasonably infer that the perpetrator intended to kill not only the targeted victim but also anyone else he knew to be within the kill zone. (*Id.* at p. 746; *Bland*, *supra*, 28 Cal.4th at pp. 329-330.) This kill zone varies depending on the nature and scope of the attack, and the means employed by the perpetrator. (*Bland*, at pp. 329-330.)

Here, defendant stated it was his intent to kill Eric C. At the time, Eric C. was engaged in a physical fight with several other people in the middle of a relatively small enclosed space. Adriana M. stood near Eric C. and saw that the gun was pointed in the direction where she and her family stood. Defendant stood at or just outside the threshold

of the bar and fired several shots into that space in the direction of Eric C., and all the people surrounding Eric C., from about 12 feet away. Therefore, it would be reasonable to infer from the evidence presented at trial that defendant intended to kill Eric C. by killing everyone in the zone of harm surrounding Eric C., including Adriana M. Accordingly, the trial court did not err by providing the kill zone jury instruction.

Moreover, defendant's reliance on *People v. Stone* (2009) 46 Cal.4th 131, 140-142 (kill zone theory not applicable where evidence showed the defendant randomly fired single shot into group of 10 individuals, striking none, and complaint charged attempted murder of specific victim), *People v. Perez* (2010) 50 Cal.4th 222, 230-232 (kill zone theory not applicable where the defendant fired a single shot into a group of eight individuals, striking one, and no evidence suggested defendant targeted any particular victim or intended to kill more than one person with a single shot), *People v. McCloud* (2012) 211 Cal.App.4th 788, 799-800 (kill zone theory does not support 46 convictions for attempted murder when the defendants fired 10 bullets into a crowded party), and *People v. Cardona* (2016) 246 Cal.App.4th 608, 614-615 (kill zone theory does not apply where the defendant fired shots at primary target to defend himself after being stabbed at crowded party) is unavailing. Neither is defendant's reliance on the prosecutor's closing argument regarding the application of the kill zone theory persuasive. While the prosecutor's argument could certainly be relevant in determining whether any error in providing the instruction was harmless, it is not determinative of whether the trial court erred in providing the instruction in the first place.

2.0 Multiple Convictions

Defendant requests that we dismiss either count 2 or count 5, in which he was convicted of violating section 246 by shooting at an occupied building. He claims he can be convicted of only a single count of shooting into an occupied building because he only shot into one building. We are not persuaded.

Section 246 provides that "[a]ny person who shall maliciously and willfully discharge a firearm at an . . . occupied building . . . is guilty of a felony . . . ." As acknowledged in *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349, "a charge of multiple counts of violating a statute is appropriate only where the actus reus prohibited by the statute—the gravamen of the offense—has been committed more than once."

Here, the gravamen of the offense is the firing of a weapon, which defendant perplexingly claims he did only once. The record does not support that assertion.

Rather, the evidence presented at trial indicates defendant shot into the bar at least four, and more than likely at least five, times: Adriana M. was struck by three bullets, Eric C. by one, there was a spent bullet found at the scene, and there were seven spent shell casings found at the scene. The evidence showed that the weapon was a nine-millimeter semiautomatic, which would have required defendant to pull the trigger, thereby discharging the firearm, at least four times. Therefore, there was evidence of separate acti rei to support each of defendant's two counts of shooting at an occupied building (in fact the evidence would have supported the allegation of even more counts).

Even if we generously construe defendant's claim as being that there was a single shooting incident because the bullets were fired in succession, he has provided no authority for the proposition that if bullets are fired in succession even though the trigger is pulled multiple times, there is only a single actus reus. Neither have we found any authority to support such a claim. Accordingly, contrary to defendant's claim, regardless of the enhancements associated with counts 2 and 5, there is a sufficient quantity of acti rei to warrant defendant's multiple convictions for violating section 246.

3.0 Presentence Custody Credit

Defendant was awarded 445 days of presentence custody credit, consisting of 445 days of credit for actual days served, but was not awarded any presentence conduct credit

because the trial court believed defendant was statutorily ineligible for conduct credit pursuant to section 2933.5. Defendant contends this was error. The People do not dispute that defendant is entitled to presentence conduct credit, but argue that we should remand to the trial court for a determination of an appropriate award based on an eligibility determination of the Department of Corrections and Rehabilitation. We agree defendant is entitled to an award of presentence conduct credit, but we disagree that remand is required.

Section 2900.5 provides, as relevant here, that a defendant receives credit against his term of imprisonment for time served in custody prior to sentencing as stated in section 4019. (§ 2900.5, subd. (a).) Pursuant to section 4019, a defendant is entitled to an award of presentence conduct credit unless the defendant fails to perform labor as directed by or to comply with the rules and regulations of the custodial facility. (§ 4019, subds. (a)(1), (b)-(c).) For defendants convicted of a violent felony, such as defendant, section 2933.1 acts as a limit on presentence conduct credit authorized by section 4019, capping the maximum credit at 15 percent of the actual period of confinement. (§ 2933.1, subd. (c); *People v. Brewer* (2011) 192 Cal.App.4th 457, 462.) Thus, pursuant to these sections, defendant is entitled to an award of 66 days of presentence conduct credit. However, the trial court declined to award any presentence conduct credit, determining that defendant was statutorily ineligible pursuant to section 2933.5.

Section 2933.5, subdivision (a) provides that certain enumerated recidivist offenders are "ineligible to earn credit on his or her term of imprisonment pursuant to this article," with "this article" being article 2.5 of chapter 7 of title 1 of part 3 of the Penal Code, relating to credit on the term of imprisonment. Neither section 2900.5 nor section 4019, which are the bases of defendant's award of presentence conduct credit, is part of article 2.5. And while section 2933.1 does appear in article 2.5, it acts as a limit on presentence conduct credit authorized by section 4019, not a basis for accrual of credit.

Moreover, it is left to the Department of Corrections and Rehabilitation, not to the trial court, to determine whether a defendant is rendered ineligible for presentence conduct credit pursuant to section 2933.5. (*People v. Goodloe* (1995) 37 Cal.App.4th 485, 494.) Therefore, the trial court's denial of presentence conduct credit based on its finding that defendant is statutorily ineligible for presentence conduct credit pursuant to section 2933.5 was premature and erroneous. (*Goodloe*, at pp. 495-496.)

Accordingly, defendant is entitled to 66 days of presentence conduct credit, unless he is deemed by the Department of Corrections and Rehabilitation to be statutorily ineligible for credit pursuant to section 2933.5. We modify the judgment to award those 66 days of conduct credit, bringing his total presentence custody credit to 511 days, and direct the clerk of the trial court to amend the abstract of judgment to reflect the same.

4.0 Surcharge

The trial court imposed a $500 surcharge without stating the statutory basis for imposition. Defendant claims we must remand the matter to the trial court to articulate the statutory authorization for this surcharge. The People submit that the surcharge was likely imposed pursuant to section 1202.4, subdivision (*l*), but allow that remand may be appropriate for clarification. Section 1202.4, subdivision (*l*) provides that a county's board of supervisors "may impose a fee to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid, to be added to the restitution fine and included in the order of the court . . . ." Here, the restitution fine was imposed in the amount of $5,000, and immediately thereafter the trial court imposed a surcharge in the amount of $500. In these circumstances, it seems abundantly clear that the trial court was imposing a 10 percent surcharge on the restitution fine pursuant to section 1202.4, subdivision (*l*). Therefore, we see no reason to remand the matter to the trial court but instead direct, for the reasons stated in *People v.*

High (2004) 119 Cal.App.4th 1192, 1200, that the abstract of judgment be corrected to reflect this statutory basis for the surcharge.

5.0 Other Sentencing Errors

As to count 2, the trial court imposed a sentence of five years for shooting at an occupied building, plus an additional 25-year-to-life term for personal and intentional discharge of a firearm proximately causing great bodily injury (§ 12022.53, subd. (d)), and two additional five-year terms for prior serious felonies (§ 667, subd. (a)). The sentence for the underlying offense is unauthorized. In light of defendant's prior serious felony convictions, the trial court was required to sentence defendant to a term of 25 years to life for shooting at an occupied building. (§ 667, subd. (e)(2)(A)(ii).) We modify the judgment to correct this sentencing error.[4]

For counts 1 and 4, the trial court imposed and stayed the following sentencing enhancements: 20 years for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)), 10 years for personal use of a firearm (§ 12022.53, subd. (b)), 10 years for personal use of a firearm (§ 12022.5, subd. (a)), and three years for personally inflicting great bodily injury (§ 12022.7, subd. (a)). However, in light of the imposition of a 25-year-to-life sentencing enhancement for both counts 1 and 4 based on defendant's personal and intentional discharge of a firearm proximately causing great bodily injury (§ 12022.53, subd. (d)), imposition of these additional enhancements is unauthorized (§ 12022.53, subd. (f)). Thus, we will modify the judgment to vacate imposition of these sentencing enhancements, and order amendment of the abstract of judgment in that regard.

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[4] In the interest of judicial economy, we have resolved this issue without first requesting supplemental briefing. Any party claiming to be aggrieved may petition for rehearing. (Gov. Code, § 68081.)

Finally, as noted by the People in respondent's brief, in its oral pronouncement of judgment, the trial court stated that it was imposing a court security fee pursuant to section 1467.8. There is no such section in the Penal Code. The abstract of judgment reflects that the court security fee is imposed pursuant to section 1465.8, which provides for a mandatory court operations assessment. Because it is obvious the trial court simply misspoke, and that it was clearly imposing the court security fee mandated by section 1465.8, we modify the judgment to reflect that correction. As the abstract of judgment already accurately reflects this as the statutory basis for the fee, no further amendment of the abstract is required.

DISPOSITION

The judgment is modified to award defendant 66 days of presentence conduct credit for a total of 511 days of presentence custody credit. The judgment is additionally modified to vacate the following sentencing enhancements previously imposed and stayed as to counts 1 and 4: 20 years for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)), 10 years for personal use of a firearm (§ 12022.53, subd. (b)), 10 years for personal use of a firearm (§ 12022.5, subd. (a)), and three years for personally inflicting great bodily injury (§ 12022.7, subd. (a)). As to count 2, the judgment is modified to reflect that defendant's sentence for violating section 246 is 25 years to life, not five years; execution of that sentence remains stayed pursuant to section 654. The judgment is further modified to reflect that the statutory basis for the court security fee imposed by the trial court is section 1465.8, as indicated in item 9.b. of the abstract of judgment. In all other respects, the judgment is affirmed. The clerk of the trial court is ordered to prepare an amended abstract of judgment reflecting these changes, and to correct the abstract of judgment to reflect that the statutory basis for the $500 surcharge is section 1202.4, subdivision (*l*). The clerk is further ordered to send a

certified copy of the amended and corrected abstract to the Department of Corrections and Rehabilitation.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.